

WHEN ARE REASONS FOR DECISION CONSIDERED INADEQUATE?

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Why the Requirement to Give Reasons?

At common law administrators were not obliged to give reasons.¹ However, now there are a number of statutory requirements similar to s 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) which provide that a Tribunal shall give reasons and that the reasons shall include the Tribunal's findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

The rationale for the requirement informs us as to the content and extent of those reasons. That rationale has been expressed in a number of ways. Reasons give an explanation for the matters the Tribunal took into account.² Reasons provide the framework from which it can be determined whether the parties were accorded procedural fairness and whether the decision is based on findings of material fact and not on mere speculation or suspicion.³ Reasons show whether the Tribunal erred in law⁴ and whether the Tribunal discharged its functions.⁵

There is a valid justification for reasons in the practical sense. They enable a reviewing court to be satisfied that the Tribunal took into account matters it was required to take into account. Such matters might be, for example, matters of jurisdiction, material facts, relevant evidence and relevant principles of law. McHugh JA put the matter succinctly in *Soulemezis v Dudley (Holdings) Pty Ltd*:⁶

The giving of reasons for a judicial decision serves at least three purposes. **First**, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment 'is not only to do but to seem to do justice': (*The Writing of Judgments* (1948) 26 Can Bar Rev at 491). Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. **Secondly**, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (*In Defence of Judicial Candor* (1987) 100 Harv L Rev 731 at 737):

... A requirement that judges give reasons for the decisions – grounds of decision that can be debated, attacked, and defended – serves a vital function in constraining the judiciary's exercise of power.

Thirdly, under the common law system of adjudication, courts not only resolve disputes – they formulate rules for application in future cases: (Taggart 'Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases' (1983) 33 *University of Toronto Law Journal*, 1 at 3-4). Hence the giving of reasons enables practitioners, legislators and members of the public

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1 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

2 *Re Palmer and Minister for ACT* (1978) 23 ALR 196, 209.

3 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 67.

4 *Collins v Repatriation Commission* (1980) 48 FLR 198.

5 *Australian Telecommunications Corporation v Davis* (1991) 30 FCR 467, 471.

6 (1987) 10 NSWLR 247, 279.

to ascertain the basis upon which like cases will probably be decided in the future. (*emphasis added*)

An oft-quoted passage from Sheppard J's judgment in *Commonwealth v Pharmacy Guild of Australia*⁷ is instructive:

The provision of reasons is an important aspect of the tribunal's overall task. Reasons are required to inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal's conclusions were arrived at. A purpose of requiring reasons is to enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case. But that is not the only important purpose which the furnishing of reasons has. A prime purpose is the disclosure of the tribunal's reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the tribunal has gone about its task appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served in the giving of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges the important statutory function which it has.

The rationale was put in a more colloquial way by Woodward J in *Ansett Transport Industries (Operations) Pty Ltd v Wraith*:

Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.⁸

The giving of reasons imposes an intellectual discipline and rigour which puts the tribunal in a position of reaching a conclusion which is reasoned and internally consistent. But the reasons are not required to be able to withstand detailed and fine critical analysis. In *Wu Shan Liang v Minister for Immigration*⁹ the Full Federal Court said that the reasons of the Minister's delegate should be beneficially construed. On appeal, the majority of the High Court commented on this observation:

When the Full Court referred to 'beneficial construction', it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is *Collector of Customs v Pozzolanic* [(1993) 43 FCR 280]. In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be 'concerned with looseness in the language ... nor with unhappy phrasing' of the reasons of an administrative decision-maker. The Court continued: 'The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.'

These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.¹⁰

What are Adequate Reasons?

There is no succinct answer to this question. It is a matter of degree. Judges differ on this issue. In *Soulemezis*, two members of the NSW Court of Appeal disagreed on the level of

⁷ (1989) 91 ALR 65, 88.

⁸ (1983) 48 ALR 500, 507.

⁹ (1995) 57 FCR 432.

¹⁰ (1996) 185 CLR 259, 271-272.

findings required. Kirby P (now a member of the High Court) (dissenting) required the grounds which led the judge to a conclusion on disputed factual questions and the findings on the principal contested issues to be set out. Mahony JA did not require this:

The law does not require that a judge make an express finding in respect of every fact leading to, or relevant to, his final conclusion of fact; nor is it necessary that he reason and be seen to reason, from one fact to the next along the chain of reasoning to that conclusion.¹¹

This is not to say that a simple statement of an ultimate conclusion bearing the evidence in mind is sufficient. There must be some process of reasoning revealed .

In *Total Marine Services Pty Ltd v Kiely*, Sackville J said:

The duty [to give reasons] must be sensibly interpreted and applied, with a view to achieving good and effective administration. It is not necessary that reasons address every issue raised in the proceedings; ... it is enough that [they] deal with the substantial issues upon which the decision turns.¹²

The requirement that review should be approached ‘sensibly and in a balanced way’¹³ has led to a ‘restrained approach’¹⁴ by members of the Federal Court when reviewing decisions of administrative tribunals.

The courts have also recognised that often members of tribunals are not lawyers, but trained laypersons, upon whom the relevant statute does not impose a ‘standard of perfection’.¹⁵ With this in mind, it is even more apparent that reasons should not be construed minutely and finely with an eye keenly attuned to the perception of error.¹⁶

Put shortly, regard is had to a tribunal’s reasons as a whole¹⁷ but it is necessary that the tribunal’s reasons expose its reasoning process in the sense that they enable a proper understanding of the basis on which a decision has been reached.¹⁸

However care must be taken not simply to recite the evidence or note that certain propositions have been put. Such an approach does not satisfy requirements such as those found in s 43(2B) of the *Administrative Appeals Act 1975* (Cth) to set out findings on material questions of fact and a reference to the evidence or other material on which those findings were based. For example, in *Dornan v Riordan*,¹⁹ a report of 178 pages was held not to disclose the Pharmaceutical Benefits Remuneration Tribunal’s reasoning process sufficiently to avoid an error of law. There was, notwithstanding the length of the decision, a substantial failure by the Tribunal to state reasons for its decision. That case involved a determination by the Tribunal which had a function under relevant provisions of the *National Health Act 1953* (Cth) to determine the prices the Commonwealth would pay in respect of pharmaceutical benefits. The legislation is somewhat complex and I do not pretend to have summarised it completely. The point was that the Tribunal held an enquiry for the purpose of

11 Supra, 271.

12 (1998) 51 ALD 635, 640.

13 *Politis v Federal Commissioner of Taxation* (1988) 2 ATC 5029, 5032, per Lockhart J.

14 *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs (NSW)* (1980) 47 FLR 131, 145 per Fisher J.

15 *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233, 255.

16 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287; *Minister for Immigration & Ethnic Affairs v Wu Shan Liang*, supra 271-272.

17 *Politis v Federal Commissioner of Taxation*, supra, 5032.

18 *Australian Telecommunications Commission v Barker* (1990) 12 AAR 490, 492.

19 (1990) 24 FCR 564.

determining, *inter alia*, the base fee for the remuneration of pharmacists. The Tribunal obtained a report from consultants and it also issued an interim report. The Tribunal decided that there should be a reduction in the base rate from \$4.55 for each ready prepared item to \$3.50, a net \$1.05 per item drop which was rather substantial. Notwithstanding the fact that there was an interim report of 239 pages with many lengthy appendices including a consultant accountants' report and although the report itself was 178 pages long the Court found it impossible to understand from the reasons given by the Tribunal why it had adopted the precise base it had. The Tribunal had said:

The decisions reached are the result of a considered judgment of the available material, all of which has been given appropriate weight and used with due caution. The result has not been reached by a series of arithmetical calculations without regard to the consequences which are likely to follow. Rather, the final conclusion is the result of balancing the findings of the studies and the available material on the cost of dispensing pharmaceutical drugs under the National Health Scheme on the one hand and a proper consideration of the likely effects of the adoption of these findings on the operation of the current pharmaceutical benefits Scheme on the other.

...

The new base rate determined herein will result in a reduction in pharmacists [*sic*] remuneration of \$1.05 per RP [Ready Prepared] item. This rate represents the maximum amount which is justified as a matter of equity and fairness having regard to all of the available evidence.²⁰

The Full Court's observation in relation to this line of reasoning was as follows (568):

These two statements are too general to make it clear what it was the \$3.50 was considered to represent. Was the \$3.50 thought to be a fair return to pharmacists having regard to their labour and their capital invested, was it thought to be a break-even fee for an average pharmacy, was it thought to be the most that the Commonwealth could reasonably be expected to pay or was it something else? The reasons do not disclose.²¹

This decision is instructive because it demonstrates that a global or general announcement by a tribunal that it has considered all the relevant evidence and reached a conclusion based on that evidence is not an adequate identification of reasons. The trial judge found that all the Tribunal had done was to set out the contentions of the parties before it and to announce its conclusion. There was nothing in its determination which was capable of being described as a reason for preferring the Commonwealth's submissions to those of the Pharmacy Guild.

Although it is not adequate for the decision-maker simply to recite every submission without any analysis, it is not necessary for every submission or consideration to be referred to. As long as the reasons deal with the substantial issues upon which the decision turns they will be adequate. In *Kermanioun v Comcare*, Finn J observed that:

The obligation to give reasons is not necessarily breached by pointing to matters which might, with advantage have been the subject of further or more detailed discussion or to possible issues which have not been mentioned (*Commissioner of Taxation v Osborne* (1990) 26 FCR 63 at 65). A Tribunal is not required to deal expressly with every consideration which passes through his mind (*Steed v Minister for Immigration and Ethnic Affairs* (1981) 37 ALR 620 at 621).²²

20 *Ibid*, 568.

21 *Id.*

22 [1998] 1529 FCA.

However, Pincus J in *Hoskins v Repatriation Commission* observed that if

a submission worthy of serious consideration and seriously advanced is not dealt with, one ought to infer that it has been overlooked, giving rise to an error of law.²³

This means that any significant fact must be recognised in such a way that the reasons themselves provide a sufficient indication that the ultimate facts to be decided have been fully kept in mind and that no significant area of primary fact has been ignored.²⁴

For example, where there is conflicting medical evidence it will usually be necessary for the tribunal to find expressly which evidence is accepted and which evidence is not accepted and to provide some reasoned basis for the choice.²⁵ Similarly, where there are a number of material facts, the tribunal must set out its findings on these facts, particularly where there are statutory provisions requiring reasons.²⁶

In short, a tribunal is obliged to make findings on the questions which are key elements to the case or central to the case raised on the material in evidence before it. A recent example of a finding by the Federal Court that this obligation was not observed is found in *Kandiah v Minister for Immigration and Multicultural Affairs*.²⁷ In order to qualify for refugee status under the Refugee Convention, an applicant has to establish a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Mr Kandiah, a Sri Lankan national and a Tamil, claimed that his fear of persecution for a Convention reason arose from his detention and torture at an army camp. He claimed that he was so badly beaten by army personnel that on his release he went to Colombo General Hospital where he remained for more than a month. Mr Kandiah relied on letters from his treating doctor confirming his treatment. Finn J found that, given the nature of the case put by Mr Kandiah, a vital question of fact for the Tribunal was whether the treating doctor's letters were genuine and truthful. Finn J said:

It is the case that if the authenticity and credibility of the letters were accepted, they were capable of corroborating in a significant way the factual centrepiece of Mr Kandiah's claim of persecution, and could do so by means untainted by any adverse view that might otherwise be taken of his credibility. They were not, in the circumstances of this particular application to the Tribunal, just another piece of evidence that needed not be dealt with expressly: cf *Steed v Minister for Immigration and Ethnic Affairs* (1981) 37 ALR 620 at 621. They were central to Mr Kandiah's application and 'common fairness' to him required they be adverted to: *Ma v Federal Commissioner of Taxation* (1992) 23 ATR 485 at 490.

There is now a considerable body of case law that emphasises variously: (i) the importance to the parties, to the public and to review bodies of adequate reasons for decisions; (ii) the understanding and restraint that courts should demonstrate when reviewing and construing reasons for administrative decisions; and (iii) the content in terms of findings and recitation of evidence that properly and reasonably can be expected of administrative decision makers.²⁸

²³ (1991) 32 FCR 443, 448.

²⁴ *Federal Commissioner of Taxation v Cainero* (1988) 15 ALD 368, 370; see also *Kermanioun v Comcare* (supra).

²⁵ *Australian Postal Commission v Wallace* (1996) 41 ALD 455; *Total Marine Services Pty Ltd v Kiely* (supra).

²⁶ See for example, the *Migration Act 1958* (Cth) s 430(1)(c) and the *Administrative Appeals Tribunal Act* s. 43(2B).

²⁷ Finn J [1998] 1145 FCA.

²⁸ *Ibid*, 11-12.

After referring to authorities on these issues his Honour concluded:

In the present case where the applicant has, primarily for reasons of credibility, been disbelieved in his claims to have been detained at Slave Island and then hospitalised, but where he has put what purports to be information from his treating doctor before the Tribunal for the purpose of substantiating his claim to hospitalisation, he was entitled to have a finding made as to whether or not that evidence was accepted or rejected. Absent that finding he was not provided with a determination of a matter that, by his own case, he sought to establish independently of his own evidence. It was open to the Tribunal to reject the evidence attributed to Dr Rajakulendran. But if it did so, it was obliged to make this known to Mr Kandiah; it was obliged to inform him why, notwithstanding this new material he put before the Tribunal, his story still was not accepted. His hospitalisation was a 'key element' in his case.

It may well be the case that the Tribunal in fact took a view as to the authenticity and/or credibility of the letters in question. If it did so, it was required to disclose that view because of the significance of the letters to Mr Kandiah's case. If it did not have such a view, then it has not made a finding on what in the circumstances was a material question of fact on which it was required to make a finding because of the case put: cf the possibilities considered in *Casarotto v Australian Postal Commission* (1989) 86 ALR 399 at 402-403.

I am, then, of the view that a breach of the requirements of s 430(1)(c) has been made out. It is clear from *Muralidharan's* case, ... that such a breach involves a failure to observe the procedures required by the Act to be observed 'in connection with the making of the decision'.²⁹

However, it must be realised that this is not such an onerous burden that every consideration needs to be recorded in the reasons. This is so even when there are no pleadings before the tribunal which formally define the issues to be decided.³⁰

What is Required?

Once again, there is no definitive answer to this question, although as mentioned earlier, where the obligation is imposed by statute, 'substantial compliance' is sufficient.³¹ In *Telstra Corporation Ltd v Arden*,³² Burchett J referred to *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* in which it was acknowledged that '[t]he extent to which a court must go in giving reasons is incapable of precise definition'.³³ Burchett J then referred to his decision in *Dodds v Comcare Australia*³⁴ where his Honour recognised that:

... it is the substance of the obligation that matters... Section 43 is not to be construed in a pedantic spirit, but sensibly. If the tribunal's reasons expose the logic of its decision, and contain findings on those matters of fact which are essential to that logic, it will not be easy to demonstrate a failure of compliance with the requirement to include 'findings on material questions of fact'.³⁵

If it is impossible to understand from the tribunal's reasons the reasoning process which led to its decision, there will have occurred a substantial failure to state reasons. The reasons should trace all steps in the reasoning process so that an observer can understand how the decision-maker reached his or her conclusion. If certain evidence was relied upon, this, and

²⁹ Ibid, 13.

³⁰ *Commissioner of Taxation v Osborne* (1990) 26 FCR 63, 65,

³¹ *Bisley Investments Corporation v Australian Broadcasting Tribunal* (supra, 255).

³² (1994) 20 AAR 285, 296.

³³ (1983) 3 NSWLR 378, 381.

³⁴ (1993) 31 ALD 690.

³⁵ Ibid, 691.

the reasons why it was so relied upon, must be set out in the reasons. Merely reciting the evidence presented, without more, is not sufficient to disclose reasoning.³⁶

When the reasons are drafted so that the reasoning is not discernible, there are grounds for review. Language must be clear and unambiguous and able to be understood by those directly involved in the case.³⁷ The parties must not be left to speculate 'about the possible course of reasoning which produced the Tribunal's conclusion'.³⁸

An error of fact is never sufficient to warrant an appeal, even if the use made of the facts can be regarded as illogical.³⁹ As Mason CJ said in *Australian Broadcasting Tribunal v Bond*:

...want of logic is not synonymous with error of law. So long as there is *some* basis for an inference...even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.⁴⁰

However, although illogical reasoning is not appellable, a lack of logically probative evidence is. The reasons must demonstrate that a finding of fact was based upon logically probative evidence, otherwise parties are unable to discern if the decision was based on mere speculation.⁴¹

When a significant fact is rejected by a decision-maker without an explanation as to why, there are grounds for appeal. In *Kermanioun v Comcare*,⁴² a key witness was unable to attend but put his evidence in a statement. Although this was the only evidence capable of corroborating the applicant's version of events, the Tribunal questioned the credibility of the statement and ultimately rejected it, without stating why. This was sufficient to found a basis for appeal. The case is instructive. The applicant claimed compensation for a back injury he said he sustained at work when lifting a heavy drum. The Tribunal was not satisfied that the acknowledged back injury was related to the applicant's employment. In other words, the Tribunal did not believe the applicant's evidence as to how his back injury was caused. A depot manager, unable to give oral evidence through ill-health, made a written statement which was tendered in evidence. The depot manager did not see the actual incident but said that the applicant told him that he had hurt his back while unloading a truck shortly after the incident was said by the applicant to have occurred. The manager made a note in the depot diary that the applicant hurt his back 'today in morning'. Parts of the diary entry were underlined with a different ink.

The Tribunal dealt with the depot manager's evidence as follows:

Then there is the problem relating to the corroboration said to be contained in the diary of the depot where the delivery was made on 28 May 1996. There is a notation said to have been put in by the depot manager, Mr Graham, when Mr Kermanioun mentioned the 'twinge' in his back. Normally, this would be capable of amounting to corroboration of Mr Kermanioun's evidence, but it is clear that the diary entry has been added to at some stage by use of a pen of a lighter colour. We do not know when the original entry was put in. We do not know when it was added to. The problem is that Mr Graham, supposedly the maker of the entry, is unavailable to give evidence, not even by telephone.

36 *Doran v Riordan* (supra).

37 *Doran v Riordan* (supra); *McAuliffe v Secretary, Department of Social Security* (1991) 13 AAR 462

38 *Comcare v Parker* unreported, Federal Court of Australia, Finn J, 2 July 1996.

39 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411.

40 (1990) 170 CLR 321, 356.

41 *Minister for Immigration and Ethnic Affairs v Pochi* (supra).

42 *Supra*.

Finn J explained why the Tribunal erred in the following way:

I would note immediately that no reference at all is made in the reasons to Mr Graham's statement nor to his claim to the authorship of the note. At best he is characterised as 'supposedly the maker of the entry'. Why Mr Graham's statement and credibility were so bluntly called into question is left unstated – if, of course, it was even adverted to and, on the fact of the reasons, there can be no reasonable assurance that such occurred. Herein lies the vice of the reasons. If Mr Graham's evidence was to be rejected, Mr Kermanioun was entitled to be informed of this and why it was so. The 28 May incident was the 'key element' in his case. I would emphasise there was no material before the Tribunal that could reasonably suggest that Mr Kermanioun and Mr Graham were acting in concert to deceive Comcare.

Mr Graham's evidence was not that of a witness to the 28 May incident. As such it could not of itself constitute proof of the incident. Nonetheless it was capable of corroborating Mr Kermanioun's story – provided, of course, it was accepted that Mr Kermanioun was truthful in his report to Mr Graham. But these were matters that the Tribunal seems not to have entered upon, or if it did it did not betray that in its reasons. One is simply left to speculate as to how Mr Graham's evidence was dealt with, if it was dealt with at all.

Mr Kermanioun was entitled to know whether Mr Graham's evidence was accepted or rejected and, given its significance to the case he advanced (i) the reasons for its rejection if rejected it was; or (ii) the reason he nonetheless failed in his claim, if it was accepted. This lack in the reasons is of so fundamental a character as to necessitate allowing the appeal.

In conclusion, it seems that reasons will be adequate if a tribunal sets out the material facts, the contentions of both sides, the findings of fact, especially when they are contested, and the reasoning relied upon to resolve any disputes, issues of fact or law.